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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JACQUELINE RIEBER, et al.,

Plaintiffs,

v.

ONEWEST BANK FSB, et al.,

Defendants.

Case No. 13-CV-2523-W(JLB)

**ORDER GRANTING
DEFENDANTS' MOTION TO
DISMISS WITH LEAVE TO
AMEND [DOC. 5]**

Pending before the Court is a motion to dismiss filed by the following defendants: OneWest Bank, F.S.B.; Deutsche Bank National Trust Company; OWB REO, LLC; and Mortgage Electronic Registration Systems, Inc. (collectively, "Defendants"). Plaintiffs Jacqueline and Richard Rieber oppose.

The Court decides the matter on the papers submitted and without oral argument. See Civ. L.R. 7.1(d.1). For the following reasons, the Court **GRANTS** Defendants' motion to dismiss the FDCPA claim **WITH LEAVE TO AMEND** [Doc. 5].

1 **I. BACKGROUND**

2 On November 8, 2007, Plaintiffs Jacqueline and Richard Rieber took out a
3 mortgage loan, secured by a deed of trust, in the amount of \$538,000 from IndyMac
4 Bank, F.S.B. (*Compl.* [Doc. 1], ¶ 10, Ex. A [Doc. 1-1] at p. 2.) The Deed of Trust
5 identifies Commonwealth Land Title Insurance Company as the trustee, and Mortgage
6 Electronic Registration Systems (“MERS”) as the beneficiary. (*Compl.*, Ex. A at p.1.)

7 According to the Complaint, “[o]n or before December 27, 2007, Plaintiffs’
8 mortgage loan was sold” to a mortgage-backed securities trust for which Deutsche Bank
9 National Trust Company serves as trustee. (*Compl.* ¶ 12.) Plaintiffs contend, however,
10 that this securitization was “botched” (*id.* at 2:26-28) because the sale was “made
11 without the required intervening assignment of Plaintiffs’ Deed of Trust and
12 endorsement of the Note” (*id.*, ¶ 17).¹

13 On March 19, 2009, the Federal Deposit Insurance Corporation (“FDIC”) sold
14 IndyMac Bank F.S.B. to OneWest Bank F.S.B. (*Compl.*, ¶ 19.) Despite Plaintiffs’
15 contention that the earlier 2007 sale to the trust was botched and thus void (*see id.*, ¶
16 18), Plaintiffs allege that their loan was not among the IndyMac assets OneWest
17 acquired as part of the FDIC sale because the loan was sold in December 2007 to the
18 mortgage-backed securities trust. (*Id.* ¶ 19.)

19 The Complaint next asserts that on March 16, 2012, MERS, as nominee for
20 IndyMac Bank F.S.B. assigned Plaintiffs’ deed of trust to OneWest. (*Compl.*, ¶ 20.)
21 This assignment was recorded on March 22, 2012. (*Id.*) Also on March 22, 2012,
22 OneWest executed a substitution of trustee, which substituted Meridian Foreclosure
23 Service for Commonwealth Land Title Insurance Company as Trustee of Plaintiffs’ deed
24 of trust. (*Id.*, ¶ 21.) This substitution was recorded on April 4, 2012. (*Id.*) Plaintiffs
25 allege that this substitution was “fraudulent and void because [OneWest] was an
26

27 ¹ Plaintiffs repeat and clarify this argument in their opposition brief. (*Opp’n* [Doc. 6],
28 5:18-6:22 (“However, the securitization, in fact, failed.”).)

1 invalid beneficiary without the power to [s]ubstitute the trustee[,]” presumably because
2 of the December 2007 sale that Plaintiffs previously alleged was void. (*Id.* (citing Cal.
3 Civ. Code § [2934a (a)(1)]).)

4 On March 30, 2012, Meridian issued a notice of default and election to sell under
5 deed of trust. (*Compl.*, ¶ 22.) The notice was recorded on April 4, 2012. (*Id.*)
6 Meridian later sold Plaintiffs’ property to OWB REB LLC. (*Id.* ¶ 24.) Plaintiffs—now
7 relying on the validity of the December 2007 sale—allege that because Deutsche Bank
8 National Trust Company held the beneficial interest in Plaintiffs’ loan, OneWest was
9 not a valid beneficiary, Meridian was not an authorized agent of a valid beneficiary, and
10 therefore the Notice of Default was void. (*Id.*)

11 On October 21, 2013, Plaintiffs filed this action in United States District Court,
12 Southern District of California. They allege a violation of the FDCPA, as well as six
13 pendent state-law claims. Plaintiffs’ FDCPA claim is the only stated basis for this
14 Court’s subject-matter jurisdiction. (*Compl.*, ¶ 7.)

15 On November 21, 2013, Defendants moved to dismiss for failure to state a claim.
16 Plaintiffs oppose.

17 18 **II. LEGAL STANDARD**

19 The court must dismiss a cause of action for failure to state a claim upon which
20 relief can be granted. Fed. R. Civ. P. 12(b)(6). A motion to dismiss under Rule
21 12(b)(6) tests the legal sufficiency of the complaint. Navarro v. Block, 250 F.3d 729,
22 732 (9th Cir. 2001). The court must accept all allegations of material fact as true and
23 construe them in light most favorable to the nonmoving party. Cedars-Sanai Med. Ctr.
24 v. Nat’l League of Postmasters of U.S., 497 F.3d 972, 975 (9th Cir. 2007). Material
25 allegations, even if doubtful in fact, are assumed to be true. Bell Atl. Corp. v. Twombly,
26 550 U.S. 544, 555 (2007). However, the court need not “necessarily assume the truth
27 of legal conclusions merely because they are cast in the form of factual allegations.”
28 Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003) (internal

1 quotation marks omitted). In fact, the court does not need to accept any legal
2 conclusions as true. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

3 “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need
4 detailed factual allegations, a plaintiff’s obligation to provide the ‘grounds’ of his
5 ‘entitlement to relief’ requires more than labels and conclusions, and a formulaic
6 recitation of the elements of a cause of action will not do.” Twombly, 550 U.S. at 555
7 (internal citations omitted). Instead, the allegations in the complaint “must be enough
8 to raise a right to relief above the speculative level.” Id. Thus, “[t]o survive a motion
9 to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state
10 a claim to relief that is plausible on its face.’” Iqbal, 556 U.S. at 678 (citing Twombly,
11 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual
12 content that allows the court to draw the reasonable inference that the defendant is
13 liable for the misconduct alleged.” Id. “The plausibility standard is not akin to a
14 ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant
15 has acted unlawfully.” Id. A complaint may be dismissed as a matter of law either for
16 lack of a cognizable legal theory or for insufficient facts under a cognizable theory.
17 Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984).

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19 **III. DISCUSSION**

20 Plaintiffs allege that OneWest and Meridian violated the FDCPA by collecting
21 mortgage payments to which they were not entitled. Plaintiffs’ theory appears to be
22 premised on the 2007 sale of their mortgage to the securities trust. (*Compl.*, ¶ 12.) As
23 a result of that sale, Plaintiffs contend that Deutsche Bank National Trust Company,
24 as trustee of the trust, owns the beneficial interest on their loan, and therefore
25 OneWest and Meridian did not have the authority to collect payments or foreclose on
26 Plaintiffs’ property. (*Id.* ¶¶ 21–25.)

27 However, the Complaint also alleges that the securitization of their loan was
28 “botched.” (*Compl.*, 2:28.) Plaintiffs contend that the 2007 transaction was “made

1 without the required intervening assignment of Plaintiffs' Deed of Trust and
2 endorsement of the Note" and, therefore, was not a "true sale[]" within the meaning
3 of the Tax Code and Pooling and Servicing Agreement." (*Id.* ¶¶ 16-17.) The
4 Complaint then quotes a section of the law they allege governs the mortgage-backed
5 securities trust in question that provides, "[i]f the trust is expressed in an instrument
6 creating the estate of the trustee, every sale, conveyance or other act of the trustee in
7 contravention of the trust... is void." (*Id.* ¶ 18 (quoting N.Y. Est. Powers & Trusts Law
8 § 7-2.4).)

9 Plaintiffs' opposition confirms their contention that the 2007 transaction was
10 void. There, Plaintiffs state that "the securitization, in fact, failed." (*Opp'n* [Doc. 6]
11 5:18; 6:2 ("the 2007 securitization failed.")) The next paragraph of their opposition
12 then again makes clear that Plaintiffs allege the securitization was void. (*Id.* 6:3-5
13 ("only one California court has considered the standing of the trustee of an MBS Trust
14 to enforce the terms of mortgage executed in California where violations of New York
15 trust law render[] the securitization of a particular loan void."))

16 Accepting as true Plaintiffs' allegation that the 2007 securitization of their loan
17 failed and was void, the only reasonable inference is that Deutsche Bank National Trust
18 Company, as trustee of the mortgage-backed securities trust, did not acquire the
19 beneficial interest in Plaintiffs' loan. Instead, IndyMack Bank F.S.B. retained that
20 interest, which was therefore among the assets the FDIC sold to OneWest on March
21 19, 2009. (*Compl.*, ¶ 19.) Accordingly, OneWest and Meridian did not lack authority
22 to collect mortgage payments, to issue the notice of default or foreclose on the Property.

23 Although true that Plaintiffs are entitled to plead mutually exclusive alternative
24 theories of their case, PAE Gov't Servs., Inc. v. MPRI, Inc., 514 F.3d 856, 859 (9th Cir.
25 2007), they have not done so here. Instead, Plaintiffs' Complaint pleads contradictory
26 facts that fail to provide fair notice to Defendants regarding the basis of the FDCPA
27 claim. The inconsistency of Plaintiffs' allegations that the securitization is void and that
28 the same securitization is valid and divests OneWest and Meridian of authority to

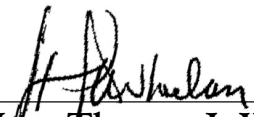
1 collect mortgage payments, keeps Plaintiffs' FDCPA claim from meeting Rule 8's
2 requirement of "a short and plain statement of the claim showing that the pleader is
3 entitled to relief" rising above a speculative level. Fed. R. Civ. P. 8(a)(2); Twombly,
4 550 U.S. at 555. Accordingly, the Court finds Plaintiffs have failed to state an FDCPA
5 claim.²

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7 **IV. CONCLUSION & ORDER**

8 In light of the foregoing, the Court **GRANTS** Defendants' motion to dismiss and
9 **DISMISSES WITH LEAVE TO AMEND** Plaintiffs' Complaint. Any amended
10 complaint must be filed on or before May 20, 2014.

11 **IT IS SO ORDERED.**

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13 **DATED: May 6, 2014**

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16 **Hon. Thomas J. Whelan**
United States District Judge

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² Because there is no other basis for subject-matter jurisdiction, the Court declines to
21 decide the remaining state-law claims. To the extent Plaintiffs plead a valid FDCPA claim in
22 an amended complaint, Defendants may reassert their challenge the state-based claims.

23 However, Defendants should refrain from using what appears to be a boilerplate motion
24 to respond to the amended complaint. In general, Defendants' motion to dismiss the
25 Complaint did little more than set forth the applicable law, while providing little or no analysis
26 regarding how the law relates to the allegations in the Complaint. For example, Defendants'
27 three-sentence FDCPA argument failed to explain how, based on the Complaint's factual
28 allegations, One West was not a "debt collector." Defendants' fraud argument set forth general
legal standards related to pleading a fraud claim, and then simply concludes with the statement
that Plaintiffs "have not identified who was authorized to speak on behalf of each defendant
or to whom the information was communicated." (*P&A* [Doc. 5-1], 5:7-9.) Plaintiffs' fraud
claim, however, does not even appear to be based on verbal communications. (*See Compl.*, ¶¶
45-48.) In short, Defendants' motion must do more than simply raise legal issues.